IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.218 OF 1996

Dilip Chunilal Sharma Petitioner
versus
Lal B. Laungani & others Respondents

Mr.P.M.Pradhan for petitioner.
None for respondent no.1.
Mr.P.S.Hingorani, APP present.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 8th September 2006

PC :

1. Heard Shri Pradhan appearing for the petitioner-original complainant. The advocate for respondent no.1 is absent although his appearance is duly filed and name is shown on the board. The rest of the respondents need not be heard at this stage.

2. The petitioner-original complainant filed a complaint before the Additional Chief Metropolitan Magistrate, 9th Court, at Bandra, Mumbai in Case No.152/S of 1995 against first respondent and others alleging offences

punishable under sections 323, 506, 504, Part-I read with 34 IPC.. The petitioner-complainant has alleged that first respondent had entered into some arrangement with the landlord and was trying to dispossess all tenants forcibly. He was misusing the Police machinery and has lodged false cases. At his instance the petitioner was dragged to Mahim Police Station on 2nd June 1995 at about 12.00 in the mid night. There, he was assaulted by the Police Officials who are other accused and the details of assault are set out in paras 2 and 3 of the complaint. As far as first respondent is concerned, it is specifically alleged in the complaint that in connivance with accused nos.2 to 4 he was assaulted and abused in filthy language and was threatened of dire consequences if he does not evict the premises at New Girgaonkarwadi, Mahim.

3. After verification statement was recorded and complaint was perused so also the petitioner’s advocate was heard, the Magistrate recorded a prima facie opinion that offence punishable under aforesaid provisions are disclosed and process, therefore, was issued summoning all accused.

4. The only grievance of Shri Pradhan appearing

for the original complainant is that the first respondent-original accused thereafter preferred an application for discharge. His submission is that though the application was styled as an application for discharge, in effect, the same was an application for recalling the order of issuance of process by learned Magistrate. Upon that application, the learned Magistrate has passed an order on 9th February 1996 (impugned order) and relying upon a judgement of Hon'ble Supreme Court reported in the case of K.M.Mathew Vs State of Kerala, the learned Magistrate proceeded to drop the case against first respondent.

5. The submission of Shri Pradhan is that the learned Magistrate had no jurisdiction to recall his earlier order. In other words, once he had held that a prima facie case is made out and had directed issuance of process and summoned all accused, it was not open for him to recall his order and such a course is impermissible in law. There is no question of application of first respondent being entertained by the same learned Magistrate. It is not as if the first respondent has no remedy in law. First respondent could have invoked either the revisional jurisdiction

of the competent Court under Cr.P.C. or could have approached this Court u/s 482 of Cr.P.C., if he was aggrieved by the order of issuing process. Surely, his remedy was not to approach the Magistrate and the Magistrate unaware of this legal position has proceeded to virtually review his order and discharged first respondent from the case. Criminal proceedings as against first respondent are totally dropped. This has resulted in complete miscarriage of justice and even otherwise for securing ends of justice this is a fit case for this Court to exercise its inherent powers and those under Article 227 of Constitution of India.

6. With the assistance of Shri Pradhan I have perused the order issuing process so also the impugned order. I have also perused relevant provisions of Cr.P.C.. After the judgement of a Larger Bench of Hon’ble Supreme Court in the case of Adalat Prasad reported in 2004(4)-Mh.L.J.274 the course adopted by the learned Magistrate was not open. He has relied upon the earlier decision of Supreme Court which now is reversed. None can dispute that the law laid down by the Supreme Court is binding upon all Courts. In such circumstances, the remedy of the first

respondent was not to approach the Magistrate but to move the higher Court invoking appropriate powers under Cr.P.C. as held by this Court in V.K.Jain Vs. Pratap V. Padode reported in 2005(3)-Mh.L.J.-778.

7. On this short ground alone the petition deserves to be allowed. Rule is accordingly made absolute in terms of prayer clause (a). Needless to state that I have not gone into the merits of the controversy and in case first respondent desires to challenge the order of learned Magistrate issuing process, it would be open for him to approach appropriate Court. In case he approaches, the appropriate Court may consider the plea to condone the delay as the order under challenge is set aside by this Court in this petition today. In other words, the time spent in prosecution of the application before the Magistrate so also this Court, may be appropriately dealt with and such orders as are permissible in law be passed in case first respondent desires to approach higher Court.

(S.C.DHARMADHIKARI, J.)